

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: COMPLAINT OF ROUDABUSH ELECTRONICS	DOCKET NO. FCU-2013-0014 (C-2013-0051)
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**ORDER GRANTING REQUEST FOR FORMAL
PROCEEDING AND ASSIGNING
TO ADMINISTRATIVE LAW JUDGE**

(Issued March 20, 2014)

I. BACKGROUND

On September 4, 2013, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a request for a formal proceeding to investigate the circumstances surrounding a complaint filed with the Utilities Board (Board) by Jason Roudabush of Roudabush Electronics on May 29, 2013, to determine whether an adjustment of charges is appropriate. The petition will be granted.

A. The Informal Complaint Proceedings

Mr. Roudabush's complaint alleged he has been charged higher prices for long-distance fax calls since 2005, when he switched his business's long distance service to his local service provider, Brooklyn Communications System (BCS). Mr. Roudabush explained that he did not complain before this time because he thought long distance rates were higher for fax calls.

Attached to the complaint were excerpts from his local bill showing charges from U.S. Billing at \$2.54 per minute for interstate calls and \$1.27 per minute for

intrastate service. The calls were billed on behalf of MCI Communications Services, Inc. (MCI).

On July 12, 2013, MCI responded to the complaint, observing that the charges were for direct-dialed long distance calls from one of Mr. Roudabush's three lines. MCI had no record of an active account with Mr. Roudabush or his business. MCI indicated it called Mr. Roudabush on July 10, 2013, and he said that he had changed the long distance service on all three lines to BCS but could not remember the exact date of the change or whether MCI was his previous long distance carrier. He said that BCS had recently taken actions to ensure that future direct-dialed long distance calls on his fax line would be carried by BCS and billed the same way as his other two lines.

MCI explained that the fax calls were billed at MCI's tariffed rates for non-subscribed toll usage, which is what happens when calls are routed and processed on MCI's network and the originating telephone number is not active on an MCI account. MCI asserted this was done pursuant to both interstate and intrastate tariffs. MCI set up a three-way call with Mr. Roudabush and BCS. BCS confirmed that the fax line number was assigned to MCI's carrier code at the time of the disputed calls. Thus, it appears that BCS considered the fax line to be assigned to MCI during the disputed time period but MCI had no account for the line. MCI concluded the charges were billed at the correct rate and declined to provide any adjustment of the charges.

On August 21, 2013, BCS indicated that it had reviewed Mr. Roudabush's account and determined that a carrier change was performed for one line from MCI to

BCS in August of 2005, a second line was changed in August of 2007, and the third line (the fax line) was not changed at either time. The customer contact records from 2005 and 2007 were no longer available, so BCS could not confirm Mr. Roudabush's request for a carrier change on all three lines.

On August 21, 2013, Board staff issued a proposed resolution concluding no adjustment of charges was required because the relevant service changes took place as long ago as 2005, so records were likely to be unavailable. Staff concluded that the lines have now been properly assigned; no cramming had taken place; and no bill adjustments were required.

B. Consumer Advocate's Request

Consumer Advocate describes certain correspondence between MCI and Consumer Advocate that took place subsequent to the issuance of the proposed resolution. In that correspondence, MCI acknowledged that its intrastate rates in Iowa are de-tariffed and asserted that the rates charged to Mr. Roudabush are found in MCI's Iowa long distance service catalog. Further, Consumer Advocate says, interstate long distance calls have also been de-tariffed, pursuant to 47 C.F.R. § 61.19(a). Those rules provide an exception for calls made by accessing a carrier using the carrier's assigned carrier access code, but the calls at issue in this matter were made directly, without using a dial-around carrier access code. Consumer Advocate concludes that there were no tariffed rates for MCI to apply to Mr. Roudabush's fax calls.

Consumer Advocate says that in the absence of tariffs, state-law remedies that were previously precluded by the filed rate doctrine now apply to these calls.

Ting v. AT&T, 319 F.3d 1126, 1139, 1143 (9th Cir. 2003). Consumer Advocate says that it appears Mr. Roudabush's 2005 attempt to re-assign the long distance services on all three of his lines, and particularly the fax line, was not successful, resulting in a situation where BCS handled the calls as if the fax line was still assigned to MCI but MCI had no account for the fax line. Mr. Roudabush continued to dial calls directly; he did not use MCI's dial-around number. He did not take any conscious action to avail himself of MCI's services. He did not agree, either explicitly or implicitly, to pay MCI a rate specified in MCI's catalogs, and "certainly not the high 'casual' rate that prompted his complaint." (Consumer Advocate request, p. 5.)

Consumer Advocate asserts that under these circumstances, MCI may be entitled to reasonable compensation for Mr. Roudabush's use of its network, but it is not entitled to a higher than reasonable rate, citing *Brooks Web Services, Inc. v. Criterion 508 Solutions*, 780 N.W.2d 248 (Iowa App. 2010), for the proposition that when one person renders services to another and the services are known to and accepted by that other, there is an implied promise to pay for those services. Under this theory, the claimant can recover the reasonable value of the services provided. Consumer Advocate argues that investigation is needed to determine whether the charges MCI caused to be billed to Mr. Roudabush were reasonable and, if not, how far back an adjustment is required. Accordingly, Consumer Advocate requests a formal proceeding to further investigate Mr. Roudabush's complaint.

C. MCI's Resistance

On September 13, 2013, MCI filed a resistance to Consumer Advocate's request. MCI asserts that Consumer Advocate seeks to challenge MCI's interstate and intrastate long distance rates, which are outside the jurisdiction of the board.

MCI says it is undisputed that Mr. Roudabush changed his long distance service provider from MCI to BCS in 2005. MCI processed the change request to close Mr. Roudabush's account, but BCS apparently continued to treat MCI as his designated long distance service provider for at least one of his three lines, causing long distance calls from that line to continue to be routed to MCI. MCI then billed the calls at its casual calling rates. MCI asserts that the records that might reveal how this situation occurred are now unavailable due to the passage of time and the Board lacks jurisdiction to consider MCI's interstate or intrastate rates, so no purpose would be served by granting Consumer Advocate's petition for further investigation of this matter.

MCI notes that most of the calls at issue were interstate calls that were billed pursuant to MCI's federal tariff, which governs interstate direct-dialed casual calls. Specifically, the definition of "Casual Caller" in MCI's FCC Tariff No. 1 includes "any presubscribed Customer located in an equal access area who has either voluntarily terminated his Company account or has had his Company account terminated...." (FCC Tariff No. 1, Original Page 9, Section A.) Similarly, the definition of "Dial-around Service (Casual Caller Service)" is "an outbound long distance service that is accessed and used to complete calls when the caller does not have an active account with the Company...." MCI says this language is broad enough to include

Mr. Roudabush's direct-dialed fax calls. Thus, MCI concludes, the interstate casual calling rates specified in MCI's FCC tariff were fully applicable to the calls and are beyond the Board's jurisdiction.

MCI also argues that because the Board deregulated intrastate long distance rates in 1996 (see 199 IAC 22.1(6)"a"(13)), the Board lacks jurisdiction to consider MCI's intrastate rates as found in MCI's Iowa Long Distance Catalog Schedule No. 1 for Residential and Small Business Customers. If the Board were to consider those rates, MCI notes that its catalog contains language similar to its FCC tariff that includes "calls placed by Casual Callers who access Company service by direct dial access...."

Finally, MCI argues that the *Ting v. AT&T* decision cited by Consumer Advocate does not support Consumer Advocate's position because the facts of the case have no bearing here and the case cannot grant the Board the authority to review MCI's interstate rates. Further, *Ting* does not authorize the Board to modify MCI's rates for unregulated intrastate services under the equitable theory of *quantum meruit* because the Board is not a court of equity; it is an administrative agency with authority that is determined by statute. MCI asserts that the Board has previously rejected claims brought under the theories of *quantum meruit* and implied contract, citing *In re: Iowa Telecommunications Assoc. et al. v. Verizon Wireless et al.*, Docket No. ARB-04-3 (SPU-00-7), 2004 Iowa PUC LEXIS 530 (2004).

D. Consumer Advocate's Reply

On September 20, 2013, Consumer Advocate filed a reply to MCI's resistance, saying that it is not asking the Board to regulate MCI's rates; instead, it is asking the

Board to apply state contract law to resolve an individual complaint by determining whether MCI has a legitimate basis for collecting the disputed charges. MCI's resistance relies on its FCC Tariff No. 1 as governing "direct-dialed" calls, yet MCI fails to address Consumer Advocate's argument that direct-dialed calls have been de-tariffed pursuant to 47 C.F.R. § 61.19. Accordingly, as applied to direct-dialed calls the tariff is invalid as a matter of law, according to Consumer Advocate.

In response to MCI's argument that the Board cannot rely on the equitable theory of *quantum meruit* to re-regulate MCI's deregulated rates, Consumer Advocate says that Iowa Code § 476.3 gives the Board the authority to address customer complaints, including broad authority to determine whether a utility's rates, charges, schedules, services, or regulations are unjust or unreasonable and the authority to determine what is just and reasonable. This gives the Board sufficient authority to determine the reasonableness "of MCI's insistence on its ability to collect the high rate specified in its invalid tariff." (Reply, p. 3.)

In the alternative, Consumer Advocate says that if the Board concludes it lacks jurisdiction, then it should disapprove or vacate the proposed resolution so that the document will not give the impression that the charges are proper and lawful.

II. LEGAL STANDARDS

Iowa Code § 476.3(1) provides, in relevant part, as follows:

If the consumer advocate determines the public utility's response to the complaint is inadequate, the consumer advocate may file a petition with the board which shall promptly initiate a formal proceeding which petition shall be granted if the board determines that there is any reasonable ground for investigating the complaint.

Thus, the issue before the Board is whether the record made in C-2013-0051 shows that there is any reasonable ground for further investigation of this matter.

The statutory "reasonable ground" standard was described in Office of Consumer Advocate v. Iowa Utilities Board, 2010 WL 4104332 (Iowa App.,

October 20, 2010). The Court of Appeals said that:

the "any reasonable grounds" language discloses a legislative intent that the Board should investigate credible cramming and slamming complaints where there are allegations of intentional wrongdoing and the company has not provided the Board with the requested verification recordings.

* * *

For instance, when applied to criminal arrests, we have equated the 'reasonable ground' standard with 'probable cause' and considered it met when the totality of circumstances would lead a reasonable, prudent person to believe a crime had been committed or that the arrestee had committed it. [Citation omitted.] The facts supporting reasonable grounds need not be strong enough to sustain a conviction under the beyond-a-reasonable doubt standard, but must rise above a mere suspicion.

(Slip op. at 6-7.) Thus, the "any reasonable ground" standard of § 476.3(1) is not a high hurdle to clear, but it requires more than a mere suspicion; the burden is on the petitioner to show that the totality of circumstances would lead a reasonable person to believe further investigation is appropriate.

III. DISCUSSION

At this stage of the proceedings, the Board is only considering whether there is any reasonable ground for further investigation of this matter, pursuant to § 476.3(1).

In order to analyze the facts and apply the law, the Board must consider possible findings and tentative interpretations of the law as applied to the record made to date. The Board is not making any final findings of fact or conclusions of law at this time; it is only considering the possibilities. With these limitations, the Board concludes that Consumer Advocate has shown reasonable grounds for further investigation, pursuant to Iowa Code § 476.103.

Consumer Advocate's request for formal proceedings does not cite § 476.103 as a basis for Board jurisdiction; instead, it relies exclusively on § 476.3. This may be because the events described in this record do not appear to fit within the definitions of "slamming" and "cramming" found at 199 IAC 22.23(1). However, Iowa Code § 476.103 and 199 IAC 22.23(2) prohibit "unauthorized changes in telecommunications service, included but not limited to cramming and slamming...." The rules then define a "change in service" as "include[ing] the addition or deletion or a telecommunications service for which a separate charge is made to a customer account." Based upon the available information, it is possible that at the end of this proceeding the Board could find that in 2005, Mr. Roudabush asked either BCS or MCI (or both) to have the presubscribed long distance service on all three of his lines changed to BCS, but one or both of the carriers made a mistake such that his fax line was effectively receiving a service that could be described as "direct-dialed casual calling," which would not be the telecommunications service he authorized, resulting in a violation of the rule and the statute.

The Board emphasizes that it is not making any such finding at this time. The facts in this case are not entirely clear at this time. Mr. Roudabush says he asked to

have the long distance service for his business lines switched to BCS in 2005, but does not recall which carrier he was changing away from. BCS says that its records for the account show that one line was changed from MCI to BCS in August of 2005, a second line in August of 2007, and the third line only recently. Meanwhile, MCI says it is undisputed that Mr. Roudabush changed his long distance service provider from MCI to BCS in 2005, at which time MCI processed the change. The Board understands that some of the company records relating to these events may no longer be available, but it is still likely that further investigation of this matter will aid in understanding what happened and how this matter should be resolved.

IV. CONCLUSION

The Board finds that the record in this proceeding establishes a reasonable ground for further investigation of this complaint. Accordingly, the Board will grant Consumer Advocate's request for formal proceeding.

V. ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The "Request for Formal Proceeding" filed on September 4, 2013, in Docket No. FCU-2013-0014 is granted, pursuant to Iowa Code §§ 476.3 and 476.103. The issues will be as alleged in the complaint and in the request, as described in this order, and as they may develop during the course of the proceedings.

2. Docket No. FCU-2013-0014 is assigned to Administrative Law Judge Amy L. Christensen for further proceedings, pursuant to Iowa Code § 17A.15 and 199 IAC 7.3.

UTILITIES BOARD

/s/ Elizabeth S. Jacobs

/s/ Nick Wagner

ATTEST:

/s/ Joan Conrad
Executive Secretary

/s/ Sheila K. Tipton

Dated at Des Moines, Iowa, this 20th day of March 2014.